



Comptroller General  
of the United States

Washington, D.C. 20548

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## Decision

Matter of: Chemonics Industries, Inc.

File: B-260284

Date: April 19, 1995

Frank M. Feffer, Jr., for the protester.  
Allen W. Smith, Department of Agriculture, for the agency.  
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of  
the General Counsel, GAO, participated in the preparation of  
the decision.

### DIGEST

Agency decision to include item in solicitation as an approved product is unobjectionable where: the relevant aspect of the governing specification does not set an objective, measurable standard; the agency's testing reasonably led it to determine that the product satisfied the specification; and the agency is permitted under the solicitation to consider the quality of the product's performance under the specification in its technical evaluation and source selection.

### DECISION

Chemonics Industries, Inc. protests the inclusion of a competitor's product in the approved product list under request for proposals (RFP) No. 49-95-04, issued by the Department of Agriculture, Forest Service. Chemonics contends that the protested product fails to satisfy one of the specifications required for approval.

We deny the protest.

The agency issued the RFP to obtain supplies of long-term fire retardants, which are used to control forest and brushland fires. The retardants are mixed with water and applied to the fire area from aircraft or ground fire-fighting equipment to slow or stop combustion. The RFP states that the retardants must be qualified and approved in accordance with the governing Forest Service specification.

The RFP anticipates award of fixed-price indefinite-quantity contracts. Section B of the RFP has two parts, one for the retardants themselves and the second for delivery charges. The first part identifies 26 retardants and calls for the

offeror to list prices per ton for each product that it offers. The 26 items include 19 retardants manufactured by Monsanto Company under the Phos-Chek label and 7 products manufactured by Chemonics under the Fire-Trol label. The RFP states that price will be the paramount consideration in the award for these items; essentially, this part establishes a multiple-award schedule structure, under which all products offered will be listed in the final contract so long as the product meets the minimum technical requirements and the price proposed is reasonable.

The second part of section B comprises a list of 54 base locations (such as Billings, Montana, and Salt Lake City, Utah). Offerors are instructed to list prices to cover transportation on a non-expedited basis of one ton of each product to each base.<sup>1</sup> The RFP states that award for these locations will be made on a "best value" basis, and that the Forest Service will give price and technical merit equal weight in making award. As to this part of section B, the Forest Service will establish a requirements contract. Thus, if Chemonics's Fire-Trol GTS-R retardant is chosen for the Billings base, for example, Billings is to order that product to satisfy all its requirements during the contract period (although exceptional use of other products may be permitted). Each of the two manufacturers, Monsanto and Chemonics, is apparently expected to receive a contract, which will include all of the manufacturer's products under the first part of section B and individual products at various bases under the second part, depending on the price/technical tradeoff performed for each base.

In its protest, Chemonics contends that HV-F, 1 of the 19 Monsanto retardants listed in section B, fails to satisfy one of the technical requirements for approval and therefore should have been excluded from the RFP. The result would be that HV-F would not be included in either part of section B and could not be chosen, under a price/technical analysis, by an individual base to fulfill its requirements for the contract period.

The system of qualifying and approving products, while it is generally used prior to, and independent of, individual procurements, is nevertheless an integral aspect of the

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<sup>1</sup>The normal practice appears to be that each of the 54 bases orders the product that it has selected under the second part of section B. The first part of section B serves as an alternative source of retardants where a fire breaks out elsewhere (that is, not within any of the 54 bases named in the second part) or where emergency circumstances preclude the use of the ordinary transportation covered by the second part.

procurement process as to the products for which qualification is required. See Goodyear Tire & Rubber Co., 72 Comp. Gen. 28 (1992), 92-2 CPD ¶ 315. Where a solicitation requires that the product procured be qualified or approved, it is improper to include in the list of approved products an item that has not been properly approved and does not satisfy the applicable specifications; an agency's including such a product in the list may constitute a basis for sustaining a protest if the agency's action prejudices another offeror. See id.

Here, Chemonics contends that the initial testing which led to the approval of HV-F was improperly conducted and that further testing by the agency demonstrated that HV-F failed to satisfy one of the specification requirements, the visibility standard. The relevant visibility requirement in the specification is as follows:

"[T]he mixed retardant shall be tested in accordance with [specification paragraph] 4.3.7.1. and visibility shall be determined to be acceptable by an experienced observer team designated by the Government (i.e., . . . lead plane pilot, and air tanker pilot, or others)."

The cited paragraph 4.3.7.1., which governs testing procedures, states:

"[The retardant] will be tested for visibility on a variety of fuel types, and conditions such as slope, aspect, daylight conditions, weather, and others by air dropping or ground tanker application depending on manufacturer's designated use. Experienced Government observers will evaluate the visibility after application."

The agency report documents the laboratory and field testing that was performed on HV-F in 1992 and 1993, and explains that the retardant was found acceptable, including as to its visibility, in that testing. In particular, HV-F was field-tested together with another Monsanto product, whose approval is not contested, and the agency personnel determined that HV-F's visibility was acceptable (indeed, two of the observers found that HV-F's visibility was somewhat superior). The retardant was used at a base during the 1993 fire season and performed satisfactorily. Accordingly, the agency approved it as a qualified retardant in January 1994.

Chemonics complains about both the procedures used in the initial testing and problems that have arisen since, which allegedly demonstrate that HV-F should be removed from the list of approved products. Concerning the testing that

preceded approval, Chemonics argues that the personnel who observed the retardant's performance were not adequately qualified and that the testing conditions did not cover a broad enough variety of conditions; it also questions the credibility of the field-test observers who found that HV-F's visibility was superior to that of the other Monsanto product.

The conduct of qualification testing is an area where contracting agencies have broad discretion so long as their action is reasonable and does not prejudice potential offerors by, for example, treating them unequally. See Goodyear Tire & Rubber Co., supra. The protester has not shown that the agency personnel who tested HV-F acted unreasonably or lacked a reasonable basis for their conclusion that HV-F satisfied the visibility requirement. Chemonics has also not shown that it suffered from unequal treatment or was otherwise prejudiced by the agency's action.


Notwithstanding Chemonics's contention that the agency was required to include specialists in particular fields, such as a retardant research specialist, in the team evaluating visibility, the specification leaves to the agency broad discretion to determine which observers to include. There is no evidence that the agency used unqualified individuals to evaluate the HV-F. With respect to the range of conditions in which the product was tested, the specification did not establish specific parameters for testing. As a result, we view this as an area in which the agency was permitted to exercise considerable discretion, and there is no evidence that the agency abused that discretion here.

Moreover, the overall evaluation of visibility plainly entails a substantial subjective element: there is no objective standard in the specification for evaluating whether a product has passed or failed a field visibility test. Chemonics does not point to any objective visibility test that HV-F did not, or could not, satisfy. Accordingly, we conclude that the initial approval of HV-F was unobjectionable.

The record does indicate that, in the first fire season after HV-F was approved, some users complained about problems with the product, concerning its visibility as well as the storing and mixing of the retardant. The agency nonetheless decided to retain HV-F as an approved retardant, although the various bases have been alerted to the potential problems. Chemonics has not demonstrated that the agency's decision in this regard was unreasonable or represented an abuse of discretion. In the context of this procurement, any base which has concerns about the

visibility of HV-F is free to take that into account in its price/technical analysis leading to selection of one retardant under the second part of section B,<sup>2</sup> particularly in view of the agency's ability to take into account concerns about HV-F's visibility in the source selection, we view the inclusion of that product in the solicitation as unobjectionable.

The protest is denied.

  
for Robert P. Murphy  
General Counsel

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<sup>2</sup>This procurement is unlike those in which placement on an approved or qualified products list is the only time that the relevant technical characteristic is evaluated. See, e.g., Wirt Inflatable Specialists, Inc., B-204673, Dec. 31, 1981, 81-2 CPD ¶ 523.